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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92048777
Party	Plaintiff adidas America, Inc.
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Date	05/05/2008
Attachments	Petitioner's Reply Memorandum in Support of Motion for Entry of Default.pdf (4 pages)(29485 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

adidas America, Inc., a Delaware
corporation,
Petitioner,

v.

Cancellation No.: 92048777
Registration No.: 2,202,454
Registration Date: November 10, 1998
Mark: PROVE IT!

Michael D. Calmese, a resident of
Arizona,
Registrant

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR
ENTRY OF DEFAULT JUDGMENT, OR ALTERNATIVELY, FOR ORDER TO
SHOW CAUSE

Petitioner, adidas America, Inc. ("Petitioner"), by and through undersigned counsel, hereby files its Reply Memorandum in support of Petitioner's Motion for Entry of Default Judgment, or Alternatively, For Order to Show Cause ("Motion for Default").

1. Registrant, Michael D. Calmese ("Registrant"), in his Response to Petitioner's Motion for Default, requested that the Board suspend the current proceeding "due to the parties [*sic*] involvement in a civil action involving related marks and other issues of law which overlap this case."¹

2. This is an obvious attempt to avoid a decision on Petitioner's Motion for Default. Such a maneuver contravenes the express purpose of Trademark Rule of Practice 2.117(b), which provides that a potentially dispositive motion may be decided before the question of suspension is considered. Petitioner's pending Motion for Default is obviously "a motion which is potentially dispositive of the case" herein. *Id.*

¹ See Respondent's Response to Petitioner's Motion for Entry of Default Judgment, or Alternatively, For Order to Show Cause ("Opposition"), p. 4, ¶14.

3. Further, Registrant's Opposition is legally insufficient because he fails to comply with the minimal requirements for such a motion.

4. Registrant's Opposition is premised on pending litigation in the United States District Court of the District of Oregon. However, Registrant has not submitted a copy of the pleadings filed in connection with this action. As governing precedent indicates, the Board will not decide a motion to suspend based on the commencement of another action unless the movant has submitted a copy of the pleadings from that other action. *See, e.g., SCOA Industries Inc. v. Kennedy & Cohen, Inc.*, 188 USPQ 411 (TTAB 1975); *Martin Beverage Co., Inc. v. Colita Beverage Corp.*, 169 USPQ 568, 570 (TTAB 1971).

5. The submission of such a copy is necessary to allow the Board to "ascertain whether the final determination of the civil action will have a bearing on the issues before the Board." *See Trademark Trial and Appeal Board of Procedure ("TBMP")* § 510.02.

6. Moreover, a movant for suspension of a proceeding on the basis of pending litigation should explain how the other action "may have a bearing" on the case, as set forth in the standard for suspension under Rule 2.117(a). Registrant's Opposition fails to provide coherent explanation of this crucial point, aside from Registrant's allegations that the litigation in the District of Oregon "involv[es] related marks and other issues of law which overlap this case." *See Registrant's Opposition*, p. 4, ¶14.

7. Registrant also fails to explain why Registrant elected not to participate in good faith in the required discovery conference prior to the Board's April 2, 2008 deadline. Rather, Registrant's Opposition merely admits and denies facts alleged in Petitioner's Motion

for Default. Such a response does not demonstrate that Registrant's inaction is the result of excusable neglect.

8. Petitioner therefore respectfully requests that Registrant's Motion for Suspension be denied and that the Board render a decision on Petitioner's Motion for Default against Registrant as the disobedient party, as provided under Rule 37(b)(2). Alternatively, Petitioner respectfully moves the Board to order Registrant to appear and show cause why he should not be sanctioned for failure to participate in good faith in the required discovery conference prior to the April 2, 2008 deadline.

Date: May 5, 2008

Respectfully submitted,

LOTT & FRIEDLAND, P.A.

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Attorneys for Petitioner adidas America, Inc.

Our File 01153-1-8820

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF DEFAULT JUDGMENT, OR ALTERNATIVELY, FOR ORDER TO SHOW CAUSE was served upon the Registrant by delivering true and correct copies of same to Registrant via Federal Express on May 5, 2008 as follows:

Michael D. Calmese
14666 N. 90th Lane
Peoria, AZ 85381

s/Jaime S. Rich
Jaime S. Rich